

**Vista Specialist Eye Center Sdn Bhd v Dato' Loo Son Yong and
another appeal**

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
B-02(NCVC)(W)-1195-07 OF 2015 AND B-02(IM) (NCVC)-1220-07
OF 2015

ROHANA YUSUF, VARGHESE GEORGE JJCA AND MARY LIM J
12 JULY 2016

*Limitation — Negligence — Medical negligence — Respondent commenced
action for medical negligence against appellants — Appellants argued action
time-barred and applied to strike out action under O 18 r 19 of the Rules of Court
2012 — How time computed — Whether respondent's claim time-barred
— Limitation Act 1953 s 6 — Rules of Court 2012 O 18 r 19*

The respondent's case against the appellants was that the cataract surgery performed by Dr Choong Yih Sheng ('the first appellant') on 14 June 2007 on the respondent had caused the respondent to suffer blurred and shadowing vision with foreign body sensation on his left eye. The problem was discovered when the respondent saw one Dr Michael Law Sie Haur on 3 February 2009. The respondent then filed a claim for medical negligence against the appellants at the High Court on 29 January 2015. The appellants applied to strike out the claim under O 18 r 19 of the Rules of Court 2012 ('the ROC') on the ground that the respondent's claim was barred by limitation of six years from the date the cause of action arose. The High Court dismissed the applications hence these appeals by the appellants. The issue between the parties centred on how time was to be computed in determining whether the respondent's claim had been barred by limitation under the Limitation Act 1953 ('the Act').

Held, allowing the appeals with costs:

- (1) According to s 6(1)(a) of the Act, it is clear that the computation of six years limitation must run from the date the cause of action arose and not from the time the alleged negligence was so discovered. The respondent's claim was barred by limitation, hence plainly unsustainable and was suitable to be struck out under O 18 r 19 of the ROC (see paras 8 & 12).

[Bahasa Malaysia summary]

Kes responden terhadap perayu-perayu adalah bahawa pembedahan katarak yang dilakukan oleh Choong Yih Sheng ('perayu pertama') pada 14 Jun 2007 ke atas responden telah menyebabkan responden mengalami penglihatan yang kabur dan berbayang dengan sensasi benda asing pada bahagian mata kirinya. Masalah diperolehi apabila responden berjumpa dengan seorang yang bernama

- A Dr Michael Law Sie Haur pada 3 Februari 2009. Responden kemudiannya memfailkan tuntutan bagi kecuaiian perubatan terhadap perayu-perayu di Mahkamah Tinggi pada 29 Januari 2015. Perayu-perayu memohon untuk membatalkan tuntutan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') atas alasan bahawa tuntutan responden dihalang oleh had masa enam tahun dari tarikh kausa tindakan yang berbangkit. Mahkamah Tinggi menolak permohonan-permohonan maka rayuan-rayuan ini oleh perayu. Isu di antara pihak-pihak berpusat ke atas bagaimana masa akan dikira dalam menentukan sama ada tuntutan responden telah dihalang oleh had masa di bawah Akta Had Masa 1953 ('Akta').
- B
- C

Diputuskan, membenarkan rayuan-rayuan dengan kos:

- (1) Mengikut s 6(1)(a) Akta, adalah jelas bahawa pengiraan enam tahun had masa mesti berjalan dari tarikh kausa tindakan berbangkit dan bukan dari masa kecuaiian yang didakwa diperolehi. Tuntutan responden adalah dihalang oleh had masa, maka jelas tidak boleh dikekalkan dan sesuai untuk dibatalkan di bawah A 18 k 19 KKM (lihat perenggan 8 & 12).]
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Notes

- E For a case on medical negligence, see 9 *Mallal's Digest* (5th Ed, 2015) para 2500.

Cases referred to

- F *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724, CA (refd)
AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663, CA (refd)
Cartledge and others v E Jopling & Sons Ltd [1963] 2 WLR 210, HL (refd)
Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)
- G *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227, FC (refd)

Legislation referred to

- H Limitation Act 1939 [UK] s 2(1)(a)
Limitation Act 1953 ss 6(1), (1)(a), 29
Limitation Act 1980 [UK]
Rules of Court 2012 O 18 r 19

- I **Appeal from:** Civil Suit No 22NCVC-51-01 of 2015 (High Court, Shah Alam)

Eunice Ong (Eunice Derek & Co) in Civil Appeal No B-02(NCVC)(W)-1195-07 of 2015 for the appellant.
T Sagadaven (Nurulhuda Mansor with him) (Shearn Delamore & Co) in Civil

Appeal No B-02(IM) (NCVC)-1220-07 of 2015 for the appellant.
Hasniza bt Teh Hassan (Tee Tai Tzian & Sim) in Civil Appeal No
B-02(NCVC)(W)-1195-07 of 2015 for the respondent.
Hasniza bt Teh Hassan (Tee Tai Tzian & Sim) in Civil Appeal No B-02(IM)
(NCVC)-1220-07 of 2015 for the respondent.

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Rohana Yusuf JCA (delivering judgment of the court):

[1] At the High Court in Shah Alam, the respondent filed a claim for medical negligence against the appellant doctor who attended to the cataract surgery of his left eye at the appellant clinic. Both appellants applied to strike out the claim of the respondent under O 18 r 19 of the Rules of Court 2012 vide ends 10 and 12 respectively. The main ground of both the applications was that the action of the respondent was barred by limitation of six years from the date the cause of action arose. The learned High Court judge dismissed both applications and hence these two appeals by the appellants before us.

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[2] Appeal No B-02(IM)(NCVC)(W)-1195-07 of 2015 is filed by the appellant clinic and the Appeal No B-02(IM)(NCVC)(W)-1220-07 of 2015 is by the appellant doctor. We will refer to the appellant doctor as the first appellant and the appellant clinic as the second appellant respectively. We heard both the appeals together on 19 January 2016 and had allowed both the appeals with costs.

E

[3] There was no disputed material fact in relation to the time of the events that happened in this case for the purpose of computing the limitation period. The dispute between parties centred on how time is to be computed in determining whether the claim of the respondent has been barred by limitation under the Limitation Act 1953. The appellants' case was that the time to compute limitation was the date of the alleged negligent surgery on 14 June 2007 that is the date the cause of the respondent's action arose. While the case of the respondent was that time only began to run upon discovery of damage on 3 December 2009.

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G

[4] The facts in gist are these. The respondent had his left eye surgery after being advised and conducted by the first appellant at the second appellant clinic on 14 June 2007. The surgery was 'the left eye phacoemulsification cataract surgery with Alcon Re Stor multifocal intraocular lens implantation'. After the operation the respondent said he complained of discomfort in the left eye but he was told by the first appellant that the condition was normal. On his last visit on 14 July 2007 to the second appellant clinic to consult the first appellant on the condition of his left eye, the respondent was however told that the first appellant had ceased working there and had moved to International Specialist Eye Centre ('ISEC') at Mid Valley, Kuala Lumpur. The respondent

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- A failed to locate the first appellant and so he saw other suitable eye specialists from time to time (see para 8 of the statement of claim). He finally saw Dr Michael Law Sie Haur at ISEC. This took place on 3 February 2009 which was almost two years after the surgery. Ten months after that visit that is on 3 December 2009 Dr Michael Law Sie Haur had performed a gas injection operation on the respondent's left eye, purportedly because the cataract surgery done on the respondent had caused problem to the respondent's left eye.

- C [5] The learned High Court judge in dismissing the application of the respondent under O 18 r 19 had found that 'the cause of action may accrue not on the date the Plaintiff undergone the 14-6-2007 operation but on the date he found out Second Defendant had been negligent in performing the said operation. The earliest date Plaintiff may have discover this, could be on the date he went to see Dr Michael for advice ie on 3-2-2009'.

- D [6] The appellants meanwhile contended that the cause of action against the appellants if any, would commence from the date of surgery on the 14 June 2007 or the 31 July 2007 that is, the date the respondent was to go for a follow up review with the first appellant. The last date for commencing the action would be 13 June 2013 or the 30 July 2013 at the latest. The writ and the statement of claim were however filed only on 29 January 2015.

- F [7] We have examined the statement of claim filed by the respondent in this case. The respondent's pleaded case was that the cataract surgery of 14 June 2007 had caused the respondent to suffer blurred and shadowing vision with foreign body sensation on his left eye. The problem was discovered when the respondent saw Dr Michael Law Sie Haur on 3 February 2009.

- G [8] Now coming back to the statutory limitation, s 6(1)(a) of the Limitation Act 1953 provides as below:

6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —

- H (a) actions founded on a contract or on tort;
(b) ...

- I In our view the above provision is clear that the computation of six years limitation must run from the date the cause of action arose and not from the time the alleged negligence was so discovered. If any further authority is required to explain the clear provision of the law we would refer to the decision of this court in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663. In interpreting s 6(1) it was held in that case that the

cause of action by the bank accrued and began to run from the alleged date of breach and not on the date such breach was discovered. The court further held in *Ambank (M) Bhd* that even though s 29 allows postponement of the limitation period until discovery of the cause of action, it only applies in cases where the cause of action is based upon fraud or a mistake or is concealed by fraud. The court in fact referred and adopted the decision of the House of Lords in *Cartledge and others v E Jopling & Sons Ltd* [1963] 2 WLR 210 in interpreting s 2(1)(a) of the UK Limitation Act 1939. The section contains similar provision to that of s 6(1) of the Limitation Act. *Cartledge* laid down the principle that limitation period runs from the date on which the cause of action accrues regardless of discovery of damage. This position in United Kingdom had however changed as a result of the passing of the Limitation Act 1980.

[9] In *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 the Supreme Court held that the cause of action accrued when there exists a person who can sue and another who can be sued and once all facts have happened which are material to be proved, to entitle the plaintiff to succeed.

[10] Having considered the above cases in our view the learned High Court judge had fallen into error in his judgment to have found that the cause of action in this case may have accrued not on the date of the surgery itself but could be the date the damage was discovered. Since the legal position on the application of limitation is clear we find no reason for this claim to proceed to a full trial.

[11] The Federal Court as well as this court has consistently struck out claims when it is clear that the statute of limitations would be relied on or raised (see *Alias bin Ismail v Hairuddin bin Mohamad & Anor* [1997] 3 MLJ 724 and *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227).

[12] Likewise, the appellants in the present case were going to rely on limitation and there would be no escape for the respondent. The respondent's claim in our view clearly is barred by limitation, hence plainly unsustainable and is suitable to be struck out under O 18 r 19 of the Rules of Court 2012. Premised on the above we allowed both the appeals with costs.

Appeals allowed with costs.

Reported by Dzulqarnain Ab Fatar